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14 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAI‘I

15 KUPALE OOKALA, INC., a Hawai‘i  
non-profit corporation; CENTER FOR  
16 FOOD SAFETY, a Washington, D.C.  
non-profit corporation,  
17

Plaintiffs,

18 v.

19 BIG ISLAND DAIRY, LLC, a Hawai‘i  
limited liability company,  
20

Defendant.

Case No. 1:17-cv-00305

COMPLAINT FOR  
DECLARATORY RELIEF,  
INJUNCTIVE RELIEF,  
AND CIVIL PENALTIES

1 **INTRODUCTION**

2 1. This is a citizen suit for declaratory relief, injunctive relief, and civil  
3 penalties brought by Plaintiffs Kupale Ookala, Inc., and Center for Food Safety,  
4 Inc. (hereinafter, “CFS”) (hereinafter, collectively, “Plaintiffs”) against Defendant  
5 Big Island Dairy, LLC (hereinafter “BID” or “the Dairy”) for violations of the  
6 Federal Water Pollution Control Act, also known as the Clean Water Act, 33  
7 U.S.C. § 1251 *et seq.* (hereinafter “CWA”), at the site of Defendant’s commercial  
8 dairy facility (hereinafter “Dairy” or “Site”) located near the community of  
9 Ookala, Hawai‘i.

10 2. This civil action is brought pursuant to the citizen suit provision of the  
11 CWA, 33 U.S.C. § 1365(a)(1)(A).

12 3. Section 301(a) of the CWA provides that “the discharge of any pollutant by  
13 any person shall be unlawful,” except in accordance with certain statutory  
14 requirements of the Act, including the requirement that a discharger obtain and  
15 comply with a National Pollutant Discharge Elimination System (“NPDES”)  
16 permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342.

17 4. Section 402 of the CWA establishes the NPDES Program, which controls  
18 water pollution by regulating point sources and industrial, municipal, and other  
19 facilities that discharge to surface waters. 33 U.S.C. § 1342.

1 5. As detailed below, Plaintiffs allege that for the past five years and 60 days,  
2 BID has violated and continues to violate the CWA by discharging pollutants to  
3 waters of the United States without a permit, in violation of §301(a) of the CWA,  
4 33 U.S.C. § 1311(a). In addition, BID has violated and continues to violate its  
5 individual NPDES permit authorizing discharges of storm water associated with  
6 construction activities, in violation of §402 of the CWA, 33 U.S.C. § 1342.

7 6. Plaintiffs seek declaratory relief establishing that Defendant has violated the  
8 CWA. Plaintiffs also seek injunctive relief directing Defendants to halt any and all  
9 continuing discharges, to obtain and comply with the terms of a NPDES permit,  
10 and to comply with the terms of BID's individual NPDES permit authorizing  
11 discharges of storm water associated with construction activities. Additionally,  
12 Plaintiffs seek the imposition of civil penalties of up to \$51,570 per violation, per  
13 day. Finally, Plaintiffs request that the Court award Plaintiffs' reasonable  
14 attorneys' and expert witness fees and costs incurred in bringing this action and  
15 any other relief that this Court deems appropriate.

16 **JURISDICTION**

17 7. This is a civil enforcement action brought under the citizen suit provisions of  
18 Section 505 of the CWA, 33 U.S.C. § 1365. This Court has subject matter  
19 jurisdiction pursuant to 33 U.S.C. § 1365(a)(1).

1 8. The Court also has federal question jurisdiction pursuant to 28 U.S.C. §  
2 1331 because this action arises under the Clean Water Act and the Declaratory  
3 Judgment Act, 28 U.S.C. § 2201, *et seq.*

4 9. The relief requested is authorized pursuant to 33 U.S.C. §§1319 and 1365(a),  
5 and 28 U.S.C. §§ 2201 and 2202.

6 10. On April 28, 2017, Plaintiffs gave notice of the alleged violations and their  
7 intent to file suit to BID, BID's registered agent, the United States Environmental  
8 Protection Agency (EPA), EPA Region IX, and the State of Hawai'i, Department  
9 of Health, as required by Section 505(a)(1) of the CWA, 33 U.S.C. § 1365(a)(1),  
10 and the implementing regulations at 40 C.F.R. § 135.2. A true and correct copy of  
11 Plaintiffs' April 28, 2017 notice letter is attached hereto as Exhibit "A" and is  
12 incorporated by reference.

13 11. On June 15, 2017, Plaintiffs gave supplemental notice of additional alleged  
14 violations and their intent to file or amend a lawsuit to BID, BID's registered  
15 agent, the United States Environmental Protection Agency (EPA), EPA Region IX,  
16 and the State of Hawai'i, Department of Health, as required by Section 505(a)(1)  
17 of the CWA, 33 U.S.C. § 1365(a)(1), and the implementing regulations at 40  
18 C.F.R. § 135.2. A true and correct copy of Plaintiffs' June 15, 2017, supplemental  
19 notice letter is attached hereto as Exhibit "B" and is incorporated by reference.

1 12. More than 60 days have passed since BID was initially notified of the  
2 allegations against it, and, upon information and belief, the violations complained  
3 of in the notices are continuing at this time or are reasonably likely to continue.

4 13. No government authority is diligently prosecuting a civil or criminal action  
5 in a state or federal court against BID for the unlawful behavior addressed in this  
6 Complaint. On May 2, 2017, the State of Hawaii, Department of Health sent an  
7 administrative Notice of Violation and Order (hereinafter, "NOV") to BID. This  
8 administrative notice does not address the allegations and relief requested by  
9 Plaintiffs. It is not a final order and is subject to further administrative appeals and  
10 judicial review. Furthermore, the State's NOV related to one violation from one  
11 area of BID on one day; it does not diligently prosecute the CWA as it relates to  
12 the numerous violations alleged herein by Plaintiffs nor does it address the ongoing  
13 violations.

14 **VENUE**

15 14. Venue properly vests in the U.S. District Court for the District of Hawai'i  
16 pursuant to Section 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1), because the  
17 source of the alleged violations is located within this judicial district.

18 **PARTIES**

19 15. Plaintiff Kupale Ookala, Inc., (hereinafter, "Kupale Ookala") is a nonprofit  
20 corporation formed under the laws of the State of Hawai'i. Kupale Ookala is a

1 group of concerned citizens who reside within the Ookala area and the island of  
2 Hawai‘i. Kupale Ookala is dedicated to protecting water, land, and scenic beauty  
3 of Ookala for the benefit of their community and future generations. Its members  
4 are committed to ensuring a healthy and safe quality of life for individuals and  
5 families who reside, work, or visit Ookala and the Island of Hawai‘i. Kupale  
6 Ookala advocates on behalf of a clean and safe environment.

7 16. Kupale Ookala’s members use and enjoy waterways in and around Ookala  
8 for cultural, recreational, and aesthetic purposes, and the environmental, health,  
9 aesthetic, economic, and recreational interests of Kupale Ookala’s members have  
10 been and will continue to be adversely affected by BID’s violations of the CWA.

11 For instance:

- 12 a. Members of Kupale Ookala live, work, engage in traditional cultural  
13 activities, and recreate in the environment that has been negatively  
14 impacted by BID’s improper manure management and operational  
15 practices. BID’s continued improper practices, and the resultant  
16 discharges, have lessened Kupale Ookala’s members’ enjoyment of  
17 their environment, and Kupale Ookala members are concerned that  
18 the environment has been irreparably injured by BID’s improper  
19 practices; and

1           b. Kupale Ookala is concerned about its members and other community  
2           members who have changed their plant and seafood collection  
3           practices due to concerns over pollution from BID. Kupale Ookala  
4           knows of individuals who used to gather plants and herbs in and near  
5           the Ookala gulches for use in oral and topical medications, but no  
6           longer do so or do so less frequently due to concerns about  
7           contamination from BID. Kupale Ookala also knows of individuals  
8           who used to swim, fish, and gather o’pihi and limu where Kaohaoha  
9           Gulch feeds into the Pacific Ocean, but who no longer do so or do so  
10          less frequently due to concerns about contamination from BID.

11 17. Waterways used and enjoyed by Kupale Ookala for the above activities  
12 include, but are not limited to, the Alaiialoa Gulch, the Kaohaoha Gulch, the Kaula  
13 Gulch (all defined as “Class 2, inland waters”), the Pacific Ocean, and other  
14 hydrologically connected waters. As described above, these waters are culturally  
15 and historically significant for many of Kupale Ookala’s members and Ookala  
16 community members, including Native Hawaiians and other longtime Ookala  
17 families. The Alaiialoa Gulch, in particular, flows through the community near a  
18 school bus drop off/pick up area, and has historically been an area where children  
19 and families come together to play and socialize. Accordingly, Kupale Ookala is  
20 interested in preserving the integrity of the Ookala area, including its waterways,

1 for current and future generations of Ookala residents and visitors, including  
2 Native Hawaiians and those persons for whom the Ookala area holds particular  
3 historical and community importance.

4 18. Kupale Ookala is a “person” within the meaning of Section 502(5) of the  
5 CWA, 33 U.S.C. § 1362(5).

6 19. Plaintiff Center for Food Safety, Inc. (CFS) is a public interest, non-profit  
7 membership organization. CFS’s mission is to empower people, support farmers,  
8 and protect the earth from the harmful impacts of industrial agriculture. Through  
9 groundbreaking legal, scientific, and grassroots action, CFS protects and promotes  
10 the public’s right to safe food and the environment.

11 20. CFS has more than 830,000 members throughout the country that support  
12 safe, sustainable agriculture, and has approximately 11,230 members living in the  
13 state of Hawai’i, including 2,307 on the island of Hawai’i.

14 21. CFS’s organizational purposes are adversely affected by BID’s violations of  
15 the CWA. BID’s violations have caused significant contamination of area surface  
16 waters and the environment. But for BID’s unlawful actions, CFS would not have  
17 to expend as much of its resources on the problems created by illegal discharges  
18 from individual large-scale industrial farming operations, and could direct these  
19 resources to other priorities.

1 22. The environmental, health, aesthetic, economic, and recreational interests of  
2 CFS's members have been and will continue to be adversely affected by BID's  
3 violations of the CWA. CFS members support the public's right to choose food  
4 and crops not sourced from or by industrial farming practices, such as CAFOs.

5 23. Upon information and belief, Big Island Dairy, LLC, is a limited liability  
6 company organized under the laws of the state of Hawai'i, with a mailing address  
7 of 695 N. 700 E., Rupert, Idaho, 83350. Big Island Dairy, LLC owns and operates  
8 a dairy facility known as "Big Island Dairy," located at 39-3308 Hawaii Belt Road,  
9 Hilo, Hawai'i (near mile marker 30).

10 24. Big Island Dairy's operation is classified as a concentrated animal feeding  
11 operation, or CAFO, as defined by the CWA, 40 C.F.R. § 122.23, and is  
12 specifically considered a "large CAFO," because it has 700 or more mature dairy  
13 cows. 40 C.F.R. § 122.23(b)(4).

14 25. Big Island Dairy, LLC is a "person" within the meaning of Section 502(5) of  
15 the CWA, 33 U.S.C. § 1362(5).

16 **STATUTORY AND REGULATORY FRAMEWORK**

17 26. The stated objective of the CWA is "to restore and maintain the chemical,  
18 physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).  
19 Congressional intent was that the discharge of pollutants into the Nation's waters  
20 be eliminated by 1985. *Id.*

1 27. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of  
2 any pollutant into the navigable waters, unless the discharge complies with various  
3 other enumerated sections of the Act. Section 301(a) prohibits discharges not  
4 authorized by, or in violation of, the terms of a valid NPDES permit issued  
5 pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p).

6 28. “Navigable waters” are broadly defined as “the waters of the United States.”  
7 33 U.S.C. § 1362(7).

8 29. The “discharge of a pollutant” means any “addition of a pollutant to  
9 navigable waters from any point source.” 33 U.S.C. § 1362(12). “Pollutant” is  
10 defined to include “industrial, municipal, and agricultural waste discharged into  
11 water.” 33 U.S.C. § 1362(6). “The term ‘point source’ means any discernable,  
12 confined and discrete conveyance, including but not limited to any pipe, ditch,  
13 channel, tunnel, conduit, well, discrete fissure, container, rolling stock,  
14 concentrated animal feeding operation, landfill leachate collection system...from  
15 which pollutants are or may be discharged.” 33 U.S.C. § 1362(14); 40 C.F.R. §  
16 122.2.

17 30. As a “point source,” a CAFO like BID is prohibited from discharging  
18 pollutants into waters of the United States under normal operating conditions, and  
19 may only discharge in the event of a 25-year, 24-hour storm event *if* that CAFO  
20

1 has coverage under and complies with a general or individual NPDES permit. 33  
2 U.S.C. §1311(a).

3 31. Section 402 of the CWA establishes the NPDES program, which is the  
4 primary means of controlling discharges from concentrated animal feeding  
5 operations and also requires permit coverage for any stormwater discharge where  
6 “the Administrator or the State, as the case may be, determines that the stormwater  
7 discharge contributes to a violation of a water quality standard or is a significant  
8 contributor of pollutants to waters of the United States.” 33 U.S.C. §  
9 1342(p)(2)(E). “Storm water” means storm water runoff, snow melt runoff, and  
10 surface runoff and drainage. 40 C.F.R. § 122.26(b)(13); HAR § 11-55-01.

11 32. Section 402 of the CWA provides that “compliance with a permit issued  
12 pursuant to this section shall be deemed compliance...with section[] 1311...of this  
13 title.” 33 U.S.C. § 1342(k).

14 33. EPA has delegated the administration of the NPDES permit program in  
15 Hawai‘i to the Department of Health (hereinafter “HDOH”). Specifically, the  
16 Clean Water Branch of the HDOH administers the NPDES permit program and  
17 issues individual NPDES permits and approves coverage under general NPDES  
18 permits, pursuant to the CWA and Hawai‘i Revised Statutes, § 342D.

19 34. Hawai‘i Revised Statutes § 342D-50(a) provides “no person, including any  
20 public body, shall discharge any water pollutant into state waters, or cause or allow

1 any water pollutant to enter state waters except in compliance with this chapter,  
2 rules adopted pursuant to this chapter, or a permit or variance issued by the  
3 director.” HRS § 342D-50(a).

4 35. To implement its delegated administration of the NPDES program and in  
5 accordance with HRS § 342D, HDOH has promulgated administrative rules for the  
6 regulation of point sources and issuance of NPDES permits. Hawai‘i  
7 Administrative Rules, Chapters 11-54, 11-55.

8 36. HDOH has issued an individual permit for discharges of stormwater  
9 associated with certain construction activities to BID. A true and correct copy of  
10 that permit, No. HIS000224, effective March 21, 2013, is attached hereto as  
11 Exhibit “C,” which incorporates the HDOH’s Standard NPDES Permit Conditions  
12 for individual permits, *available at*  
13 <http://health.hawaii.gov/cwb/files/2013/05/stdcond15.pdf> (last accessed June 28,  
14 2017) (hereinafter, Permit No. HIS000224 is referred to as BID’s “Stormwater  
15 Construction Permit”).

16 37. HDOH has not developed a general NPDES permit for CAFOs in the state  
17 of Hawai‘i; any CAFO must therefore obtain coverage under an individual NPDES  
18 permit.

19 38. The CWA authorizes citizens to file suit against any person alleged to be in  
20 violation of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1). An

1 “effluent standard or limitation” includes a “permit or condition thereof issued  
2 under section 1342.” 33 U.S.C. § 1365(f)(6).

3 **FACTS**

4 39. All preceding paragraphs are incorporated herein.

5 *Big Island Dairy, LLC’s Dairy Operation*

6 40. Big Island Dairy, LLC, commenced operations of its Dairy in 2012. Prior to  
7 2012, a different dairy was operated at BID’s site by different owners.

8 41. Messrs. Derek and Steve Whitesides are co-managers of Big Island Dairy,  
9 LLC.

10 42. According to public records, BID operates its dairy CAFO on approximately  
11 2,500 acres near the community of Ookala, northwest of Hilo, Hawai‘i. BID also  
12 owns and farms an offsite 160-acre cropland between Ookala and Hilo.

13 43. According to public records, as of April 2017, BID housed at least 2,599  
14 animals at its Dairy. The manure generated by BID’s cows is collected and used  
15 on-site; it is not removed from the property, sold, or given away to the public. At  
16 its Dairy, BID composts manure, applies it to croplands, and stores liquid manure  
17 in at least two storage lagoons.

18 44. BID did not obtain a NPDES permit for its CAFO when it began operations  
19 in 2012 and, upon information and belief, still has not received any individual  
20 NPDES permit for the operation of its CAFO.

*Big Island Dairy, LLC's Unpermitted Discharges*

1  
2 45. Upon information and belief, Plaintiffs allege that BID has repeatedly  
3 discharged pollutants into Alaiialoa, Kaohaoha, and Kaula Gulches, all of which  
4 discharge or flow into the Pacific Ocean.

5 46. Alaiialoa, Kaohaoha, and Kaula Gulches (hereinafter, collectively,  
6 “Gulches”) are either “waters of the United States,” or, as “discernable, confined  
7 and discrete conveyance[s],” are point sources under the CWA. The Pacific Ocean  
8 is a water of the United States.

9 47. The groundwater, due to the volcanic soils and geology underlying the BID  
10 operation, is hydrologically connected to the Gulches.

11 48. Upon information and belief, Plaintiffs allege that BID has discharged and  
12 continues to discharge pollutants into the Alaiialoa, Kaohaoha, and Kaula  
13 Gulches—and in turn, the Pacific Ocean—in the following ways:

- 14 a. Improper application of manure wastewater to BID’s crop fields,  
15 including over-application (that is, non-agronomic applications) and  
16 application on high wind days or immediately preceding or during a  
17 precipitation event, causing surface runoff into the Gulches;
- 18 b. Seepage of manure wastewater from crop fields, composting areas,  
19 animal pens, and lagoons, into ground which is hydrologically  
20 connected to the Gulches;

1 c. Overflow of manure wastewater from lagoons, including via a  
2 channelized “spillway” that connects the lower lagoon directly to  
3 Kaohaoha Gulch; and

4 d. Leakage from animal water troughs, which flows through animal  
5 waste collection areas and carries waste into the Gulches.

6 49. The pollutants in these discharges includes, but are not limited to, liquid and  
7 solid animal wastes. The animal wastes contain, among other pollutants, fecal  
8 coliform and E. coli bacteria, numerous other pathogens, nitrogen, phosphorus, and  
9 suspended solids, and can alter water quality indicator parameters such as  
10 biochemical oxygen demand and pH. Such pollution, especially the pathogens  
11 associated with dairy operations, presents threats to public health and the  
12 environment.

13 50. Upon information and belief, these discharges occur on a recurring basis and  
14 have occurred since at least April 28, 2012—approximately weekly or more—as  
15 described in Exhibits A and B. Upon information and belief, Plaintiffs allege that  
16 BID has illegally discharged animal waste at least on the specific dates identified  
17 in Exhibits A and B.

18 51. Upon information and belief, the discharges Plaintiffs allege herein were not  
19 authorized by, and could not be authorized by, an applicable NPDES permit and  
20 were not due to or a direct result of a 25-year, 24-hour rainfall event.

1 *Big Island Dairy's Violations of NPDES Permit Authorizing Discharges of*  
2 *Stormwater Associated with Construction Activities (No. HIS000224)*

3 52. BID's Stormwater Construction Permit requires BID to comply with all  
4 materials submitted in and with its application for coverage, including a  
5 description of the scope of construction at the Site, which is described as "two  
6 freestalls, a lagoon, digester and bedding master structures and a parlor."  
7 Stormwater Construction Permit, Section A.1; Section 1.7 of BID's "Site-Specific  
8 Construction Best Management Practice Plan."

9 53. Upon information and belief, Plaintiffs allege that BID is currently  
10 constructing a milk processing facility at the Site, outside the approved scope of its  
11 construction activities and in violation of its Stormwater Construction Permit.

12 54. BID's Stormwater Construction Permit prohibits BID from "caus[ing] or  
13 "contribut[ing] to a violation of the basic water quality criteria as specified in  
14 HAR, Chapter 11-54, Section 11-54-4." Stormwater Construction Permit, Section  
15 A.5.

16 55. Upon information and belief, the Gulches (identified as "receiving waters"  
17 in BID's Stormwater Construction Permit), are not meeting basic water quality  
18 criteria. Recent water quality tests have shown elevated levels of turbidity, and  
19 Plaintiffs' observations, photographs, and videos depict brown, clouded water.  
20 Water quality tests have also shown very high levels of E.coli and enterococcus,

1 which may be “toxic to human, animal, plant, or aquatic life[,]” in violation of  
2 BID’s Stormwater Construction Permit.

3 56. BID’s Stormwater Construction Permit requires BID to “[i]nspect, at a  
4 minimum of once per week, the receiving state waters...to detect violations of  
5 conditions which may cause or contribute to a violation of the basic water quality  
6 criteria as specified in HAR, Chapter 11-54, Section 11-54-4[,]” and must  
7 immediately stop or modify its construction activities or Best Management  
8 Practices to stop or prevent violations of basic water quality criteria. Stormwater  
9 Construction Permit, Sections A.6 and A.7.

10 57. Upon information and belief, Plaintiffs allege that BID is not conducting  
11 weekly inspections, nor has it taken immediate steps to correct violations of basic  
12 water quality criteria, in violation of its Stormwater Construction Permit.

13 58. BID’s Stormwater Construction Permit requires BID to “[e]nsure that any  
14 comingled storm water that contacts pollution sources/contaminated soil is  
15 prevented from discharging to State waters.” Stormwater Construction Permit,  
16 Section B.2.

17 59. Upon information and belief, Plaintiffs allege that BID is not preventing  
18 storm water that contacts pollution sources on BID’s Site from discharging to State  
19 waters, in violation of its Stormwater Construction Permit.

20

**CLAIMS FOR RELIEF**

**COUNT I**

**Discharge of Pollutants  
Without an NPDES Permit**

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60. Plaintiffs incorporate the allegations contained in the above paragraphs as  
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though fully set forth herein.

61. Section 301 of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of  
pollutants unless pursuant to the terms of a valid NPDES permit issued pursuant to  
Section 402 of the CWA, 33 U.S.C. § 1342.

62. The Gulches are all “waters of the United States” subject to the CWA or are  
“point sources” from which pollutants are being discharged to the Pacific Ocean, a  
“water of the United States.”

63. BID did not and does not have an NPDES permit authorizing discharges into  
such waterways from its CAFO operation.

64. Since at least April 28, 2012, BID has discharged pollutants associated with  
its CAFO operation into waters of the United States, continues to discharge such  
pollutants, and is likely to continue to do so in the future.

65. BID has discharged and continues to discharge pollutants associated with its  
CAFO operation in at least those ways enumerated in Paragraph 48, e.g., by  
improper application of manure wastewater to its fields, by causing seepage of  
manure wastewater from fields, compost areas, pens, and lagoons into groundwater

1 that is hydrologically connected to the Gulches, by causing its manure storage  
2 lagoons to overflow into a spillway that flows directly into Kaohaoha Gulch, and  
3 by causing water troughs to leak and flow through waste collection areas, thereby  
4 transporting waste into the Gulches.

5 66. Each discharge that BID has committed since commencing operations  
6 constitutes a separate and distinct violation of the CWA.

7 67. In discharging manure wastewater without a permit into waters of the United  
8 States, including the Alaialoa, Kaohaoha, and Kaula Gulches and the Pacific  
9 Ocean, BID has violated and continues to violate section 301(a) of the CWA, 33  
10 U.S.C. § 1311(a).

## 11 **COUNT II**

### 12 **Failure to Comply with Stormwater NPDES Construction Permit**

13 68. Plaintiffs incorporate the allegations contained in the above paragraphs as  
14 though fully set forth herein.

15 69. The CWA prohibits the discharge of pollutants from a point source into  
16 waters of the United States, unless pursuant to the terms of a NPDES permit. 33  
17 U.S.C. §§ 1311(a), 1342.

18 70. The CWA requires a NPDES permittee to comply with all conditions of its  
19 permit. 33 U.S.C. §§ 1311(a), 1365(f)(2), (f)(6); 40 C.F.R. § 122.41.

1 71. BID has been issued an individual NPDES permit authorizing discharges of  
2 storm water associated with specified construction activities, No. HIS000224,  
3 under section 402 of the CWA. 33 U.S.C. § 1342.

4 72. As described herein, BID has failed to comply with multiple provisions of its  
5 Stormwater Construction Permit and is likely to continue to do so in the future.

6 73. Each incident of noncompliance that BID has committed since obtaining  
7 permit coverage constitutes a separate and distinct violation of the CWA.

8 74. In failing to comply with its Stormwater Construction Permit and conditions  
9 thereof issued under section 1342, BID has violated and continues to violate  
10 section 402 (a) of the CWA, 33 U.S.C. § 1342.

11 **RELIEF REQUESTED**

12 WHEREFORE, Plaintiffs respectfully request that the Court enter a  
13 judgment:

14 A. Declaring that BID has violated and continues to be in violation of Section  
15 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for the unlawful discharges of  
16 pollutants associated with its dairy operations to waters of the United States;

17 B. Declaring that BID has violated and continues to be in violation of Section  
18 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for the unlawful discharges of  
19 pollutants stemming from unpermitted construction activities to waters of the  
20 United States;

1 C. Declaring that BID has violated and continues to be in violation of Section  
2 402 of the Clean Water Act, 33 U.S.C. § 1342, for its failure to comply with its  
3 individual permit for discharges of polluted storm water associated with  
4 construction activities at Dairy;

5 D. Enjoining BID from discharging pollutants from its Dairy into waters of the  
6 United States except as authorized by and in compliance with an applicable  
7 individual NPDES permit;

8 E. Ordering BID to comply fully and immediately with all applicable  
9 requirements of its Stormwater Construction Permit (No. HIS000224);

10 F. Ordering BID to pay civil penalties of up to \$51,570 per day, per violation,  
11 for all violations of the Clean Water Act at the Dairy Site, pursuant to Sections  
12 309(d) and 505(a) of the Act, 33 U.S.C. §§ 1319(d), 1365(a), and 40 C.F.R.  
13 §§19.1-19.4;

14 G. Ordering BID to remediate any harm caused by BID's noncompliance with  
15 the Clean Water Act and to eliminate any potential for future harm;

16 L. Ordering BID to pay Plaintiffs' reasonable attorneys' fees, expert witness  
17 fees, and costs incurred in prosecuting this action pursuant to 33 U.S.C. § 1365(d);  
18 and

19 M. Awarding any such other relief as the Court may deem just and proper.  
20

1 RESPECTFULLY SUBMITTED AND DATED this 28th day of June,  
2 2017.

3 TERRELL MARSHALL LAW GROUP PLLC

4  
5 By: /s/ Amanda M. Steiner, #10359

6 Amanda M. Steiner, #10359  
7 Email: asteiner@terrellmarshall.com  
8 936 North 34th Street, Suite 300  
9 Seattle, Washington 98103-8869  
10 Telephone: (206) 816-6603  
11 Facsimile: (206) 319-5450

12 Charles M. Tebbutt, *pro hac vice forthcoming*  
13 Email: charlie@tebbuttlaw.com  
14 Sarah A. Matsumoto, *pro hac vice forthcoming*  
15 Email: sarah@tebbuttlaw.com  
16 LAW OFFICES OF CHARLES M.  
17 TEBBUTT, P.C.  
18 941 Lawrence Street  
19 Eugene, Oregon 97401  
20 Telephone: (541) 344-3505  
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Paige Tomaselli, *pro hac vice forthcoming*  
Email: ptomaselli@centerforfoodsafety.org  
Sylvia Wu, *pro hac vice forthcoming*  
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CENTER FOR FOOD SAFETY  
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San Francisco, California 94111  
Telephone: (415) 826-2770  
Facsimile: (415) 826-0507

*Attorneys for Plaintiffs Kupale Ookala and Center  
for Food Safety*

# EXHIBIT A

**Law Offices of Charles M. Tebbutt, P.C.**  
**941 Lawrence Street**  
**Eugene, OR 97401**  
**Ph: 541-344-3505 Fax: 541-344-3516**

April 28, 2017

---

**THIS IS AN URGENT LEGAL MATTER REQUIRING YOUR**  
**IMMEDIATE ATTENTION**

*Via Certified Mail, Return Receipt Requested:*

Mr. Brad Duff  
General Manager, Big Island Dairy  
Mr. Riley Smith  
Co-owner & Dairy Manager, Big Island Dairy  
39-3308 Hawaii Belt Road  
Hilo, HI 96720

Mr. Steven Whitesides  
Manager, Big Island Dairy LLC  
P.O. Box 55  
Ookala, HI 96774

Mr. Derek Whitesides  
Mr. Steven Whitesides  
Managers, Big Island Dairy LLC  
695 N. 700 E  
Rupert, ID 83350

Mr. Glen T. Hale  
Registered Agent, Big Island Dairy LLC  
2970 Kele St., Ste. 210  
Lihue, HI 96766

*Other recipients identified on last page*

**NOTICE OF INTENT TO SUE PURSUANT TO THE FEDERAL WATER POLLUTION  
CONTROL ACT, 33 U.S.C. § 1365(a)(1)**

Dear Sirs:

Pursuant to the citizen suit provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1) (hereinafter referred to as the "Clean Water Act" or "CWA"), Kupale Ookala, a Hawaii not-for-profit corporation, and Center for Food Safety, a Washington, D.C.

not-for-profit corporation (hereinafter, “Notifiers”), hereby notify you that on or after the 60<sup>th</sup> day from the date of this notice, Notifiers intend to initiate a citizen suit in Hawaii Federal District Court against Big Island Dairy, LLC, the owner of Big Island Dairy, located at 39-3308 Hawaii Belt Road (hereinafter referred to as “Big Island Dairy”). The lawsuit will allege that Big Island Dairy has violated and remains in violation of the Clean Water Act and applicable state water pollution control laws by discharging animal wastes, solid manure, liquid manure, fuel, and chemical pollutants to waters of the United States without coverage under a valid National Pollutant Discharge Elimination System (“NPDES”) permit, and by failing to comply with the terms of its NPDES permit authorizing discharges of stormwater associated with construction activities. The animal waste contains bacteria and other pathogens harmful to human health and the environment.

### LEGAL FRAMEWORK

The Clean Water Act is the cornerstone of surface water quality protection in the United States. Sections 301 and 402 of the CWA establish the basic requirement that the discharge of pollutants into surface waters requires a permit before any such discharge is allowed. Section 301 of the CWA provides that “except as in compliance with...section...1342...of this title, the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a).<sup>1</sup> Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) Program, which controls water pollution by regulating point sources. Concentrated animal feeding operations, or CAFOs, are point sources under the Clean Water Act. 33 U.S.C. § 1362(14). As such, a CAFO is prohibited from discharging pollutants into waters of the United States under normal operating conditions and may only discharge in the event of a 25-year, 24-hour storm event if that CAFO has coverage under and complies with a general or individual NPDES permit. 33 U.S.C. § 1311(a). Big Island Dairy qualifies as a “Large CAFO,” because that it has 700 or more mature dairy cows. 40 C.F.R. § 122.23(b)(4).

Further, section 402 requires permits for any stormwater discharge where “the Administrator or the State, as the case may be, determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.” 33 U.S.C. § 1342(p)(2)(E). “Storm water” means storm water runoff, snow melt runoff, and surface runoff and drainage. 40 C.F.R. § 122.26(b)(13).

EPA has delegated the administration of the NPDES permit program in Hawaii to the Hawaii Department of Health (“HDOH”). The Clean Water Branch of the Department of Health, specifically, administers the NPDES permit program by issuing individual permits and approving coverage under general permits. Hawaii does not have a “general” CAFO NPDES permit; accordingly, discharges from any CAFO in Hawaii should be covered under an individual NPDES permit. Additionally, HDOH requires that persons engaged in “construction activities, including, but not limited to, clearing, grading, excavation, and construction support

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<sup>1</sup> Similar language is reflected in Hawaii Revised Statutes § 342D-50(a), which provides: “No person...shall discharge any water pollutant into state waters, or allow any water pollutant to enter state waters except in compliance with this chapter, rules adopted pursuant to this chapter, or a permit or variance issued by the director.”

activities that result in the disturbance of one acre or more of total land area” obtain coverage under the general NPDES permit for their construction-related stormwater discharges. Hawaii Administrative Rules (“HAR”), Chapter 11-55, Appendix C, Section 1.1 (NPDES General Permit Authorizing Discharges of Storm Water Associated with Construction Activity, effective 12/6/2013). Alternatively, HDOH may require any applicant to apply for an individual permit. HAR, Chapter 11-55, Appendix C, Section 2.3.

Once regulated by a NPDES permit, permittees must comply with all terms and conditions of that permit. Permittees who violate the terms of any applicable permit are subject to citizen enforcement actions, and citizens may bring suit against a party discharging pollutants into waters of the United States without a permit. *See, e.g., Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001). The Clean Water Act authorizes citizens to file suit against any person alleged to be in violation of an effluent standard or limitation. 33 U.S.C. § 1365(a)(1). An “effluent standard or limitation” includes a “permit or condition thereof issued under section 1342.” 33 U.S.C. § 1365(f)(6).

According to publicly-available records, Big Island Dairy lacks coverage under a general or individual CAFO permit. Public records also indicate that Big Island Dairy has obtained an individual permit for construction-related stormwater discharges under HAR Ch. 11-55, Permit No. HI S000224, effective March 21, 2013 (hereinafter “Stormwater Construction Permit”).

### **VIOLATIONS OF THE CLEAN WATER ACT**

Notifiers intend to initiate a citizen suit on or after the 60th day from the date of this letter against Big Island Dairy for failing to comply with the Clean Water Act. Specifically, the lawsuit will allege that Big Island Dairy has discharged and continues to discharge animal wastes, liquid and solid manure, fuel, and chemical pollutants, along with related pollutants, from a point source into waters of the United States, including ditches and drainage canals, gulches, streams, and coastal waters of the Pacific Ocean. Big Island Dairy has no NPDES permit authorizing these discharges. The pollutants that have been, are being, and will continue to be discharged include facility wastewater, process water, washwater, liquid and solid animal wastes, debris, sediment, chemicals, and deceased cows or parts thereof. Animal waste contains, among other pathogens and pollutants, fecal coliform and E. coli bacteria, nitrogen, phosphorus, and suspended solids. The lawsuit will also allege that Big Island Dairy has violated and remains in violation of numerous provisions of its Stormwater Construction Permit.

#### Unpermitted Discharges

Big Island Dairy’s improper manure management and storage practices are causing unpermitted discharges of liquid and solid animal waste. Upon information and belief, Big Island Dairy sprays liquid manure on its crop fields during high wind days or immediately preceding or during a precipitation event. Applications are also made in quantities that exceed any notion of an “agronomic rate.” Additionally, Big Island Dairy’s upper and lower manure storage lagoons are located in close proximity to Kaohaoha Gulch. Big Island Dairy’s lower lagoon includes an overflow spillway and conveyance channel into Kaohaoha Gulch, and typically has minimal available freeboard. The spillway and conveyance have been deeply

channelized over the years, evidence that discharges of animal wastes from the lagoon to the Kaohaoha Gulch occur frequently. Big Island Dairy stores composted manure solids on an uncovered, concrete-padded loading area in close proximity to Alaiialoa Gulch, and deposits deceased cows directly into an open pit in an existing gulch on its property. Pollutants from the dairy operations that flow through this gulch enter the lower lagoon, which, in turn, overflows into an adjacent spillway and discharges into Kaohaoha Gulch.

Other operational practices at Big Island Dairy are also a problem. Big Island Dairy does not safely store its caustic detergent and acidic clean-in-place chemicals; HDOH staff have observed multiple 55-gallon drums of caustic detergent and acid stored together on pallets, outdoors, and without any secondary containment. Big Island Dairy also has at least four above-ground gasoline and diesel fuel storage tanks on its property, at least one of which experienced an approximately 100-gallon diesel leak in 2015 (documented by HDOH).

Discharges of liquid and solid animal waste, wastewater, process water, washwater, debris, sediment, deceased cows or parts thereof, fuel, and chemicals resulting from Big Island Dairy's improper manure application and storage practices, and improper operational practices, as described above, have occurred and continue to occur regularly, on approximately a weekly basis, from at least April 28, 2012 to present, into one or more of Alaiialoa Gulch, Kaohaoha Gulch, and Kaula Gulch, which are classified as Class 2 inland state waters that flow into the Pacific Ocean.

In addition to the recurring discharges described above, upon information and belief, unpermitted discharges resulting from the improper manure management and storage practices described above have occurred on at least the following specific dates:

- 6/30/14: animal waste discharge into Alaiialoa Gulch, as documented by HDOH
- 7/1/14: animal waste discharge into Alaiialoa Gulch, as documented by HDOH
- 7/2/14: animal waste discharge into Alaiialoa Gulch, as documented by HDOH
- 9/24/16: animal waste discharge into Kaohaoha Gulch
- 3/5/17: animal waste discharge into Alaiialoa Gulch
- 3/10/17: animal waste discharge into Alaiialoa Gulch
- 3/14/17: animal waste discharge into Alaiialoa Gulch
- 3/19/17: animal waste discharge into Kaohaoha Gulch
- 4/2/17: animal waste discharge into Alaiialoa Gulch
- 4/17/17: animal waste discharge into Alaiialoa Gulch

#### Violations of Stormwater Construction Permit

Upon information and belief, Big Island Dairy has violated and remains in violation of numerous provisions of its Stormwater Construction Permit, including, but not limited to:

- Section A.1: "The Permittee shall [c]omply with all materials submitted in and with the application, dated January 3, 2013, and additional information, dated January 17, 2013." These materials include a description of the scope of construction at the site, which includes "two freestalls, a lagoon, digester and bedding master structures and a

parlor.” See Section 1.7 of “Site-Specific Construction Best Management Practice Plan,” dated 1/3/13, revised 1/16/13. Upon information and belief, a milk processing facility is currently being constructed at the site, in violation of Big Island Dairy’s Stormwater Construction Permit.

- Section A.5: “The Permittee shall [n]ot cause or contribute to a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.” Recent photographs, videos, personal observations, and test results indicate that Big Island Dairy’s receiving waters are not meeting basic water quality criteria; specifically, tests have shown elevated turbidity, and photographs and videos depict very brown, turbid water. HAR, Chapter 11-54, Section 11-54-4(a)(3). Test results also show very high levels of E.coli and enterococcus, which may be “toxic to human, animal, plant, or aquatic life[,]” in violation of Big Island Dairy’s Stormwater Construction Permit. HAR, Chapter 11-54, Section 11-54-4(a)(4).
- Sections A.6 and A.7: “The Permittee shall [i]nspect, at a minimum of once per week, the receiving state waters...to detect violations of and conditions which may cause or contribute to a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4[,]” and “The Permittee shall [i]mmediately stop, reduce, or modify construction, or implement new or revised BMPs as needed to stop or prevent a violation of basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.” Upon information and belief, Big Island Dairy is not conducting weekly inspections nor is it taking immediate steps to correct violations of basic water quality criteria, in violation of its Stormwater Construction Permit.
- Section B.2: “The Permittee shall [e]nsure that any comingled storm water that contacts pollution sources/contaminated soil is prevented from discharging to State waters.” Upon information and belief, Big Island Dairy is not preventing storm water that contacts pollution sources on Big Island Dairy’s site from discharging to State waters, in violation of its Stormwater Construction Permit.
- Section B.6: “The Permittee shall [i]mmediately notify the Director of all incidences of noncompliance and identify the pollutant(s) source(s) and the proposed and implemented control or mitigative measures as required in Section 16 of the “Standard NPDES Permit Conditions.” Upon information and belief, Big Island Dairy has not notified HDOH of its noncompliance with any sections of its Stormwater Construction Permit, including the sections identified herein, in violation of its Stormwater Construction Permit.
- Section B.8: “The Permittee shall [submit] [a]ll reports, notifications, and updates to information on file...through the CWB Compliance Submittal Form for Individual NPDES Permits and Notice of General Permit Coverages (NGPCs).” The HDOH permit file associated with Permit No. HI S000224 contains no records of inspection or monitoring reports or updates to any permit information. Upon information and belief, Big Island Dairy has not submitted the required reports, notification, or updates, in violation of its Stormwater Construction Permit.

- Section C. Section C describes Best Management Practices (“BMPs”), construction management techniques, vegetation controls, and structural controls. Upon information and belief, Big Island Dairy has violated numerous provisions of Section C, including: failing to prevent loose particles, sand, soil, silt, and other construction debris from being washed away by storm water to drainage systems and State waters, discharging water used for dust control and irrigation to State waters, failing to implement appropriate BMPs for unprotected stockpiled material, failing to assure that the implemented BMPs are effective and that discharge effluent is in compliance with basic State water quality standards, failing to properly construct and maintain erosion and sediment control measures throughout the construction period, failing to regularly inspect and repair control measures and keep records of the same, failing to maintain records of the duration and volume of storm water discharges, failing to divert storm water flowing toward the construction area, and failing to ensure that discharges do not cause or contribute to a violation of basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.

Additionally, Big Island Dairy must adhere to the “Standard NPDES Permit Conditions” available on the HDOH website at <http://health.hawaii.gov/cwb/files/2013/05/stdcond15.pdf> (version 15; *conditions formerly available at* <http://www.hawaii.gov/health/environmental/water/cleanwater/index.html>, identified in Big Island Dairy’s Stormwater Construction Permit as version 14). Upon information and belief, Big Island Dairy has violated and continues to violate multiple sections of the Standard NPDES Permit Conditions, including Section 1.a (narrative basic water quality criteria), Section 6 (duty to comply), Section 8 (duty to mitigate), Section 9 (proper operation and maintenance), Section 14 (monitoring and records), and Section 16 (reporting requirements). As described above, Big Island Dairy is causing or contributing to violations of basic water quality criteria, is out of compliance with multiple provisions of its Stormwater Construction Permit, has failed to take all reasonable steps to minimize or prevent discharges, has failed to properly operate and maintain facilities and systems of treatment or control used to achieve compliance with its Stormwater Construction Permit, has failed to properly inspect and monitor water quality when necessary, and has failed to submit such reports to HDOH. Additionally, Big Island Dairy is engaged in construction activities that exceed the scope of its permitted construction.

### CIVIL PENALTIES

Notifiers will allege in the lawsuit that each of the separate failures identified above constitutes a discrete violation of the Clean Water Act, subjecting Big Island Dairy to a daily penalty of up to \$51,570 per day, per violation.

In addition to civil penalties, Notifiers will seek an order requiring Big Island Dairy to abate all discharges and to obtain and come into full compliance with an individual NPDES CAFO Permit and with the terms of its Stormwater Construction Permit. Furthermore, Notifiers will seek an order from the Court requiring Big Island Dairy to pay Notifiers’ attorneys’ fees and costs, which include expert witness fees and costs.

## PARTIES GIVING NOTICE

The names, addresses, and phone numbers of the parties giving this Notice of Intent to Sue are:

Kupale Ookala  
P.O. Box 5  
Ookala, HI 96774  
Tel: 808-216-1028

Center for Food Safety  
1132 Bishop Street, Suite 2107  
Honolulu, HI 96813  
Tel: 808-681-7688

The names, addresses, and phone numbers of counsel for the parties giving this Notice of Intent to Sue are:

Charles M. Tebbutt  
Sarah A. Matsumoto  
Daniel C. Snyder  
Law Offices of Charles M. Tebbutt, P.C.  
941 Lawrence St.  
Eugene, OR 97401  
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[charlie@tebbuttlaw.com](mailto:charlie@tebbuttlaw.com)  
[sarah@tebbuttlaw.com](mailto:sarah@tebbuttlaw.com)  
[dan@tebbuttlaw.com](mailto:dan@tebbuttlaw.com)

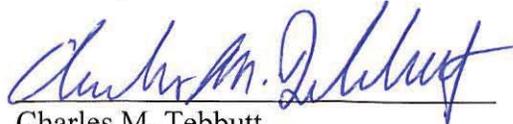
George Kimbrell  
Sylvia Wu  
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Fax: 415-826-0507  
[gkimbrell@centerforfoodsafety.org](mailto:gkimbrell@centerforfoodsafety.org)  
[swu@centerforfoodsafety.org](mailto:swu@centerforfoodsafety.org)

## CONCLUSION

We will be available to discuss effective remedies and actions that will assure Big Island Dairy's future compliance with the Clean Water Act, and all other applicable state and federal environmental laws. If you wish to avail yourself to this opportunity and avoid the need for

adversarial litigation, or if you have any questions regarding this letter, please contact the undersigned. If you are or will be represented by an attorney, please have that attorney contact the undersigned instead.

Sincerely,



Charles M. Tebbutt  
Sarah A. Matsumoto  
Daniel C. Snyder  
Law Offices of Charles M. Tebbutt, P.C.

*cc Via Certified Mail, Return Receipt Requested, to the following:*

Scott Pruitt, Administrator  
U.S. Environmental Protection Agency, Mail Code: 1101A  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Alexis Strauss, Acting Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne St.  
San Francisco, CA 94105

Dr. Virginia Pressler, Director  
State of Hawai'i, Department of Health  
1250 Punchbowl Street  
Honolulu, HI, 96813

# EXHIBIT B

**Law Offices of Charles M. Tebbutt, P.C.**  
**941 Lawrence Street**  
**Eugene, OR 97401**  
**Ph: 541-344-3505 | Fax: 541-344-3516**

June 15, 2017

---

*Via Certified Mail, Return Receipt Requested:*

Mr. Brad Duff  
General Manager, Big Island Dairy  
Mr. Riley Smith  
Co-owner & Dairy Manager, Big Island Dairy  
39-3308 Hawaii Belt Road  
Hilo, HI 96720 (also sent by regular mail)

Mr. Steven Whitesides  
Manager, Big Island Dairy LLC  
P.O. Box 55  
Ookala, HI 96774

Mr. Derek Whitesides  
Mr. Steven Whitesides  
Managers, Big Island Dairy LLC  
695 N. 700 E  
Rupert, ID 83350

Mr. Glen T. Hale  
Registered Agent, Big Island Dairy LLC  
2970 Kele St., Ste. 210  
Lihue, HI 96766

*Via e-mail to:*

Daniel V. Steenson  
Sawtooth Law Offices, PLLC  
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Boise, ID 83702  
Dan@SawtoothLaw.com

*Other recipients identified on last page*

**SUPPLEMENTAL NOTICE OF INTENT TO SUE PURSUANT TO THE FEDERAL  
WATER POLLUTION CONTROL ACT, 33 U.S.C. § 1365(a)(1)**

Dear Sirs:

This is a supplemental notice of intent to sue Big Island Dairy, LLC that is premised upon and provides further detail to Notifiers' initial Notice of Intent to Sue, sent on April 28, 2017. Pursuant to the citizen suit provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1) (hereinafter referred to as the "Clean Water Act" or "CWA"), Kupale Ookala, a Hawaii not-for-profit corporation, and Center for Food Safety, a Washington, D.C. not-for-profit corporation (hereinafter, "Notifiers"), hereby notify you that on or after the 60<sup>th</sup> day from the date of this notice, Notifiers intend to initiate or amend a citizen lawsuit in Hawaii Federal District Court against Big Island Dairy, LLC, the owner of Big Island Dairy, located at

39-3308 Hawaii Belt Road (hereinafter referred to as “Big Island Dairy”). This notice letter expressly incorporates by reference the contents of Notifiers’ initial Notice of Intent to Sue, sent on April 28, 2017. The lawsuit will allege that Big Island Dairy has violated and remains in violation of the Clean Water Act and applicable state water pollution control laws by discharging animal wastes, solid manure, liquid manure, fuel, and chemical pollutants to waters of the United States without coverage under a valid National Pollutant Discharge Elimination System (“NPDES”) permit, and by failing to comply with the terms of its NPDES permit authorizing discharges of stormwater associated with construction activities. The animal waste contains bacteria and other pathogens, as well as hormones and antibiotics used on the animals, which are harmful to human health and the environment.

### VIOLATIONS OF THE CLEAN WATER ACT

Notifiers intend to initiate or amend a citizen suit on or after the 60th day from the date of this letter against Big Island Dairy for failing to comply with the Clean Water Act. In addition to the allegations included in Notifiers’ April 28, 2017 Notice of Intent to Sue (“NOI”), Notifiers will allege that Big Island Dairy’s improper land application, compost storage, and liquid manure storage and handling practices are resulting in unlawful discharges of animal waste to area gulches—and in turn, the Pacific Ocean—from point sources that are hydrologically connected to surface waters. As previously noted, concentrated animal feeding operations, such as Big Island Dairy, are defined as point sources under the Clean Water Act. 33 U.S.C. § 1362(14). Big Island Dairy’s fields, production areas, and lagoons discharge pollutants to ground and groundwater that is hydrologically connected to Alaialoa Gulch, Kaohaoha Gulch, and Kaula Gulch; those gulches flow into the Pacific Ocean. The Hawaii District Court has recognized that groundwater may serve as a conduit through which pollutants are discharged, such that liability under the Clean Water Act may attach. *Hawaii Wildlife Fund v. County of Maui*, 24 F. Supp. 3d 980, 994, 998 (D. Haw. 2014), appeal docketed, No. 15-17447 (9th Cir. Dec. 15, 2015). Alaialoa Gulch, Kaohaoha Gulch, and Kaula Gulch are either waters of the United States, or are point source conduits that discharge to waters of the United States (the Pacific Ocean).

Discharges of liquid and solid animal waste, wastewater, process water, washwater, debris, sediment, deceased cows or parts thereof, fuel, and chemicals resulting from Big Island Dairy’s improper application and storage practices, and improper operational practices, as described above, have occurred and continue to occur regularly, on approximately a weekly basis, from at least April 28, 2012 to present, into one or more of Alaialoa Gulch, Kaohaoha Gulch, and Kaula Gulch, which are classified as Class 2 inland state waters that flow into the Pacific Ocean. These discharges pollute the environment and expose the community to significant health risks, including exposure to *E. coli*, and other bacteria and types of pathogens.

In addition to the recurring discharges described above and in Notifiers’ April 28, 2017 NOI, upon information and belief, unpermitted discharges resulting from the improper management and storage practices described above have occurred on at least the following specific dates (these dates are in addition to those dates listed in Notifiers’ April 28, 2017 NOI):

- 3/29/17: animal waste discharge into Kaohaoha Gulch, as documented by HDOH
- 5/15/17: animal waste discharge into Alaialoa Gulch

- 5/15/17: animal waste discharge into Kaula Gulch
- 5/18/17: animal waste discharge into Kaula Gulch

### CIVIL PENALTIES

Notifiers will allege in the lawsuit that each of the separate failures identified above and in their April 28, 2017 NOI constitutes a discrete violation of the Clean Water Act, subjecting Big Island Dairy to a daily penalty of up to \$51,570 per day, per violation.

In addition to civil penalties, Notifiers will seek an order requiring Big Island Dairy to abate all discharges and to obtain and come into full compliance with an individual NPDES CAFO Permit and with the terms of its Stormwater Construction Permit. Furthermore, Notifiers will seek an order from the Court requiring Big Island Dairy to pay Notifiers' attorneys' fees and costs, which include expert witness fees and costs.

### PARTIES GIVING NOTICE

The names, addresses, and phone numbers of the parties giving this Notice of Intent to Sue are:

Kupale Ookala  
P.O. Box 5  
Ookala, HI 96774  
Tel: 808-216-1028

Center for Food Safety  
1132 Bishop Street, Suite 2107  
Honolulu, HI 96813  
Tel: 808-681-7688

The names, addresses, and phone numbers of counsel for the parties giving this Notice of Intent to Sue are:

Charles M. Tebbutt  
Sarah A. Matsumoto  
Daniel C. Snyder  
Law Offices of Charles M. Tebbutt, P.C.  
941 Lawrence St.  
Eugene, OR 97401  
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[dan@tebbuttlaw.com](mailto:dan@tebbuttlaw.com)

Paige Tomaselli

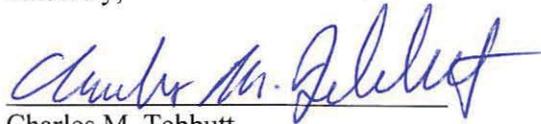
Sylvia Wu  
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Amanda Steiner  
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Seattle, WA 98103  
Tel: 206-466-6223  
Fax: 206-350-3528  
[ASteiner@terrellmarshall.com](mailto:ASteiner@terrellmarshall.com)

### CONCLUSION

We will be available to discuss effective remedies and actions that will assure Big Island Dairy's future compliance with the Clean Water Act, and all other applicable state and federal environmental laws. As the lawyers for the parties have already established contact, if you have any questions about the content of this supplemental notice and wish to work with Notifiers to resolve the pollution discharges from Big Island Dairy, as Notifiers have offered but so far been ignored, please contact the undersigned.

Sincerely,



Charles M. Tebbutt  
Sarah A. Matsumoto  
Daniel C. Snyder  
Law Offices of Charles M. Tebbutt, P.C.

*cc Via Certified Mail, Return Receipt Requested, to the following:*

Scott Pruitt, Administrator  
U.S. Environmental Protection Agency, Mail Code: 1101A  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

Alexis Strauss, Acting Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne St.

San Francisco, CA 94105

Dr. Virginia Pressler, Director  
State of Hawai'i, Department of Health  
1250 Punchbowl Street  
Honolulu, HI, 96813

# EXHIBIT C

PERMIT NO. HI S000224

**AUTHORIZATION TO DISCHARGE UNDER THE  
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

In compliance with the provisions of the Clean Water Act, as amended, (33 U.S.C. §1251 *et seq.*; the "Act"); Hawaii Revised Statutes, Chapter 342D; and Hawaii Administrative Rules (HAR), Chapters 11-54 and 11-55, Department of Health (DOH), State of Hawaii;

**BIG ISLAND DAIRY**

(hereinafter PERMITTEE),

is authorized to discharge storm water associated with construction activities from the Big Island Dairy project site located at O'Okala Road and State Highway 19, O'Okala, Island of Hawaii, Hawaii, TMK: (3) 3-9-002:008 to the receiving State waters identified in the table below:

Discharge Point No.	Receiving State Water	Classification	Latitude (N)	Longitude (W)
1	Ka'ula Gulch	2, Inland Waters	19°59'54"	155°17'55"
2	Alaialoa Gulch	2, Inland Waters	20°00'01"	155°17'04"
3	Alaialoa Gulch	2, Inland Waters	19°59'53"	155°17'06"
4	Kaohaoha Gulch	2, Inland Waters	20°00'00"	155°16'45"
5	Kaohaoha Gulch	2, Inland Waters	19°59'45"	155°17'02"

in accordance with the general requirements, discharge monitoring requirements and other conditions set forth herein, and in the attached DOH "Standard NPDES Permit Conditions," that is available on the DOH, Clean Water Branch (CWB) website at: <http://www.hawaii.gov/health/environmental/water/cleanwater/index.html>.

All references to Title 40 of the Code of Federal Regulations (CFR) are to regulations that are in effect on July 1, 2011, except as otherwise specified. Unless otherwise specified herein, all terms are defined as provided in the applicable regulations in Title 40 of the CFR.

This permit will become effective on **March 21, 2013**.

This permit and the authorization to discharge will expire at midnight, **March 20, 2018**.

Signed this 21<sup>st</sup> day of March, 2013.

  
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(For) Director of Health

**FINAL PERMIT  
March 21, 2013**

**PERMIT NO. HI S000224**  
**Page 2**

**TABLE OF CONTENTS**

<u>Part</u>	<u>Description</u>	<u>Page</u>
A.	GENERAL REQUIREMENTS.....	3
B.	REPORTING REQUIREMENTS .....	5
C.	BEST MANAGEMENT PRACTICES (BMPs) .....	7
D.	MAPS .....	10

ATTACHMENT:  
STANDARD NPDES PERMIT CONDITIONS (VERSION 14)

**PART A**  
**PERMIT NO. HI S000224**  
**Page 3**

**A. GENERAL REQUIREMENTS**

The Permittee shall:

1. Comply with all materials submitted in and with the application, dated January 3, 2013, and additional information, dated January 17, 2013.
2. Retain a copy of the application, including other related materials, and this permit at the job site or at a nearby field office.
3. Design, operate, implement, and maintain the project Site-Specific Best Management Practices (BMPs) Plan to ensure that storm water discharges associated with construction activities will not cause or contribute to a violation of applicable State water quality standards.
4. Implement the project Site-Specific BMPs Plan as often as needed to improve the quality of storm water discharges or when instructed by the Director of Health (Director).
5. Not cause or contribute to a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.
6. Inspect, at a minimum of once per week, the receiving state waters, storm water runoff and control measures and BMPs to detect violations of and conditions which may cause or contribute to a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4 (e.g., the permittee shall look at storm water discharges and receiving state waters for turbidity, color, floating oil and grease, floating debris and scum, materials that will settle, substances that will produce taste in the water or detectable off-flavor in fish, and inspect for items that may be toxic or harmful to human or other life).
7. Immediately stop, reduce, or modify construction, or implement new or revised BMPs as needed to stop or prevent a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.
8. Review the effectiveness and adequacy of the implemented Site-Specific BMPs Plan(s) and Erosion and Sediment Control (ESC) Plan(s) at a minimum of once per week, and update the plan as often as necessary. Any changes(s) to the Site-Specific BMPs Plans and/or ESC Plans or correction(s) to information already on file with the CWB shall be maintained onsite and be available upon request.

**PART A**  
**PERMIT NO. HI S000224**  
**Page 4**

9. Know that Mr. Steve Whitesides of Big Island Dairy shall submit all information/documents for compliance with the NPDES conditions. An authorized representative may be appointed in accordance with Part B.8.

**PART B**  
**PERMIT NO. HI S000224**  
**Page 5**

**B. REPORTING REQUIREMENTS**

The Permittee shall:

1. Submit the following information in accordance with Part B.8. for review and comment **at least 30 calendar days before the start of construction activities.**

**All questions/concerns that the DOH may have must be answered to the satisfaction of the CWB.**

- a. A copy of the County-approved Erosion and Sediment Control (ESC) Plan and/or Grading Permit (Section No. 1.8 of the CWB SSCBMP Plan Template).
- b. Site inspection details including: names and contact information for the persons to be responsible for conducting repairs to BMPs onsite; and general procedures and time frames for correcting problems when they are identified (Section No. 3.4. of the CWB SSCBMP Plan Template).
2. Ensure that any comingled storm water that contacts pollution sources/contaminated soil is prevented from discharging to State waters.
3. Notify the Director of the construction start date in accordance with Part B.8. within seven (7) calendar days before the start of construction activities.
4. Complete and submit the Solid Waste Disclosure Form for Construction Sites to the DOH, Solid and Hazardous Waste Branch, Solid Waste Section as specified on the form at least 30 calendar days before the start of construction activities. The form can be downloaded at:  
<http://www.hawaii.gov/health/environmental/waste/sw/pdf/swdiscformnov2008.pdf>.
5. Submit any changes to information on Item Nos. 1, 3, 4, 5, or 16 of the CWB-Individual NPDES Form C to the CWB as soon as changes arise. The changes shall be submitted in accordance with Part B.8. The Permittee shall properly address all related concerns and/or comments to the CWB's satisfaction.
6. Immediately notify the Director of all incidences of noncompliance and identify the pollutant(s) source(s) and the proposed and implemented control or mitigative measures as required in Section 16 of the "Standard NPDES Permit Conditions".

**PART B**  
**PERMIT NO. HI S000224**  
**Page 6**

7. Complete and submit the Notice of Cessation (NOC) in accordance with Part B.8. within 14 calendar days of completion of the subject project.
8. All reports, notifications, and updates to information on file shall be submitted through the CWB Compliance Submittal Form for Individual NPDES Permits and Notice of General Permit Coverages (NGPCs). This form is accessible through the e-Permitting Portal website at: <https://eha-cloud.doh.hawaii.gov/epermit/View/home.aspx>. If not already registered, you will be asked to do a one-time registration to obtain your login and password. After you register, click on the Application Finder tool to locate the form. Follow the instructions to complete and submit this form. All submissions shall include a CD or DVD containing the downloaded e-Permitting submission and a completed Transmittal Requirements and Certification Statement for e-Permitting NPDES/NGPC Compliance Submissions Form, with original signature and date.
9. Include the following certification statement, NPDES permit number, and original signature on each submittal in accordance with HAR, Chapter 11-55, Section 11-55-07(b). Failure to provide this information on future correspondence or submittals may be a basis for delay of the processing of the document(s).

**"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine or imprisonment for knowing violations."**

10. The Permittee shall develop and submit a facility-specific waste load allocation (WLA) implementation and monitoring plan to the Director when a Total Maximum Daily Load (TMDL), which specifies WLAs applicable to the Permittee's discharge, is approved by the EPA within one (1) year of notification of the approval date.

**PART C**  
**PERMIT NO. HI S000224**  
**Page 7**

**C. BEST MANAGEMENT PRACTICES (BMPs)**

1. The Permittee shall:
  - a. Refrain from performing any work during heavy rainstorms.
  - b. Prevent loose particles, sand, soil, silt, and other construction debris at the project site from being washed away by storm water runoff to drainage systems and to State waters.
  - c. Remove the excavated material as soon as possible or at the end of each work day. The excavated material shall be disposed in a State and/or County-approved landfill site.
  - d. Not discharge water used for dust control to State waters.
  - e. Not discharge water used for irrigation to State waters.
  - f. Not discharge hydrotesting effluent to State waters without an appropriate NPDES permit.
  - g. Not discharge dewatering effluent to State waters without an appropriate NPDES permit.
  - h. Not stockpile unprotected materials on-site without implementing the appropriate BMPs for the stockpile(s).
  - i. Wash-down vehicles and/or equipment and concrete truck drums only at designated areas and not discharge the wash waters to State waters. The concrete wash water shall not be allowed to infiltrate into the ground.
  - j. Assure that the implemented BMPs are effective and the discharge effluent is in compliance with the basic State water quality standards.
2. The following special conditions apply to all land disturbance work conducted under this permit:
  - a. Construction Management Techniques
    - (1) Clearing and grubbing shall be held to the minimum necessary for grading and equipment operation.

**PART C**  
**PERMIT NO. HI S000224**  
**Page 8**

- (2) Construction shall be sequenced to minimize the exposure time of the cleared surface area.
- (3) Construction shall be staged or phased for large projects. Areas of one (1) phase shall be stabilized before another phase is initiated. Stabilization shall be accomplished by temporarily or permanently protecting the disturbed soil surface from rainfall impacts and runoff.
- (4) Erosion and Sediment Control Measures shall be in place and functional before earth moving operations begin. These measures shall be properly constructed and maintained throughout the construction period.
- (5) All control measures shall be checked and repaired as necessary, for example, weekly in dry periods and within 24 hours after any rainfall of 0.5 inches or greater within a 24-hour period. During prolonged rainfall, daily checking is necessary. The Permittee shall maintain records of checks and repairs.
- (6) The Permittee shall maintain records of the duration and estimated volume of storm water discharge(s).
- (7) A specific individual shall be designated to be responsible for erosion and sediment controls on each project site.

**b. Vegetation Controls**

- (1) Pre-construction vegetative ground cover shall not be destroyed, removed, or disturbed more than 20 calendar days prior to land disturbance.
- (2) Temporary soil stabilization with appropriate vegetation shall be applied on areas that will remain unfinished for more than 30 calendar days.
- (3) Permanent soil stabilization with perennial vegetation or pavement shall be applied as soon as practical after final grading. Irrigation and maintenance of the perennial vegetation shall be provided for 30 calendar days or until the vegetation takes root, whichever is shorter.

**PART C**  
**PERMIT NO. HI S000224**  
**Page 9**

c. **Structural Controls**

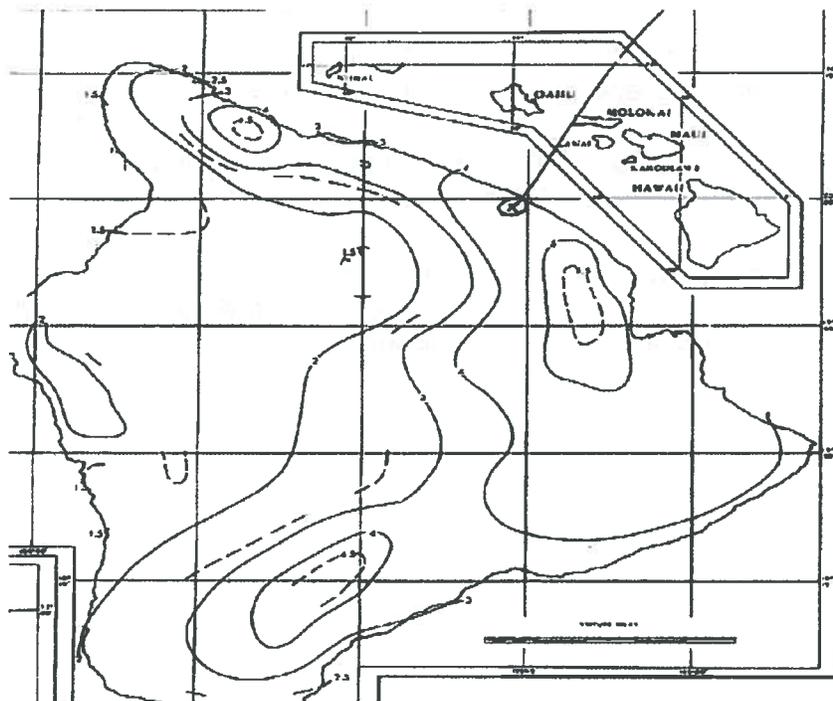
- (1) Storm water flowing toward the construction area shall be diverted by using appropriate control measures, as practical.
- (2) Erosion Control Measures shall be designed according to the size of disturbed or drainage areas to detain runoff and trap sediment.
- (3) Water must be discharged in a manner that the discharge shall not cause or contribute to a violation of the basic water quality criteria as specified in HAR, Chapter 11-54, Section 11-54-4.

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**FINAL PERMIT**  
**March 21, 2013**

**PART D  
PERMIT NO. HI S000224  
Page 10**

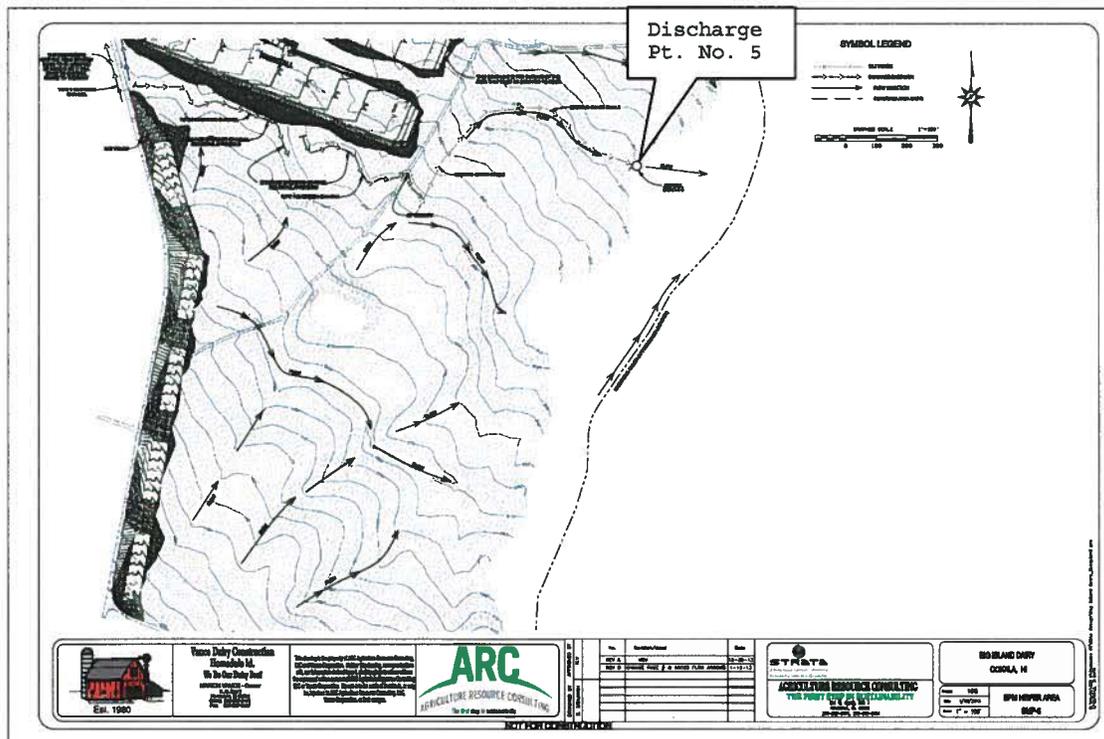
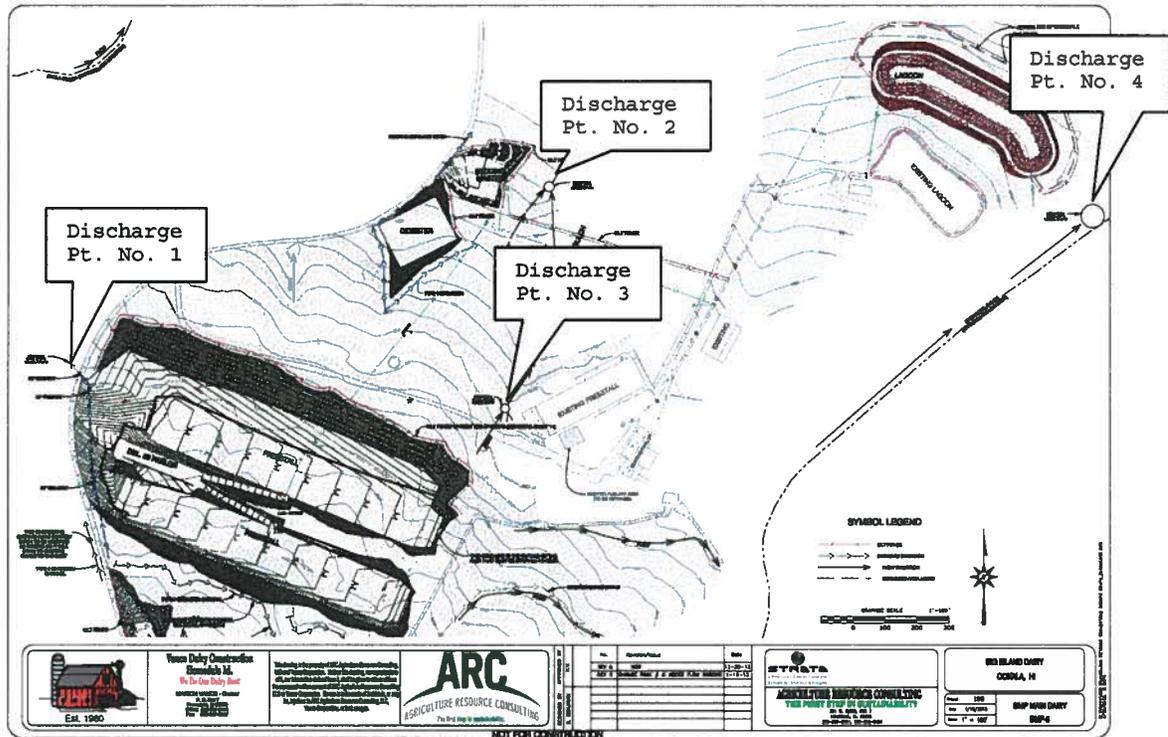
**D. MAPS**



**Map 1 –Location Maps**

**FINAL PERMIT  
March 21, 2013**

**PART D  
PERMIT NO. HI S000224  
Page 11**



**Map 2 -Outfall Maps**

**FINAL PERMIT  
March 21, 2013**